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The Paradox of Compliance: Infringements and Delays in Transposing European Union Directives

ROBERT THOMSON, RENÉ TORENVLIED AND JAVIER ARREGUI*

What impact does the negotiation stage prior to the adoption of international agreements have on the subsequent implementation stage? We address this question by examining the linkages between decision making on European Union directives and any subsequent infringements and delays in national transposition. We formulate a preference-based explanation of failures to comply, which focuses on states' incentives to deviate and the amount of discretion granted to states. This is compared with state-based explanations that focus on country-specific characteristics. Infringements are more likely when states disagree with the content of directives and the directives provide them with little discretion. Granting discretion to member states, however, tends to lead to longer delays in transposition. We find no evidence of country-specific effects.

Compliance with European Union (EU) legislation is an example of both policy implementation and the enforcement of international bargaining agreements. Policy implementation is the transmission of the outcomes of collective decision making into implementers' actions.¹ Implementers often have incentives and opportunities to deliver policy performances that deviate from the policies they are charged with implementing, which might lead to 'bureaucratic drift'.² However, in many political systems the policies implemented are generally in line with those decided on by policy makers.³ This is known as 'the paradox of compliance'. For a large proportion of EU legislation, rather than delegating implementation to independent agencies, member states are themselves responsible for implementation. Directives, which we focus on here, must be transposed into national legislation, which means that the boundary between decision makers and

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¹ Laurence J. O'Toole Jr, 'Multi-organizational Policy Implementation: Some Limitations and Possibilities for Rational Choice Contributions', in Fritz W. Scharpf, ed., *Games in Hierarchy and Networks: Analytical and Empirical Approaches to the Study of Governance Institutions* (Frankfurt am Main/Boulder, Colo.: Campus Verlag/Westview Press, 2003), pp. 27–64.

² Matthew D. McCubbins, Roger G. Noll and Barry R. Weingast, 'Structure and Process as Solution to the Politician's Principal–Agency Problem', *Virginia Law Review*, 75 (1989), 431–82; Kenneth Shepsle, 'Bureaucratic Drift, Coalitional Drift, and Time Consistency: A Comment on Macey', *Journal of Law, Economics and Organization*, 8 (1992), 111–18.

³ William Gormley Jr, *Taming the Bureaucracy: Muscles, Prayers, and Other Strategies* (Princeton, N.J.: Princeton University Press, 1989); Charles Goodsell, *The Case for Bureaucracy* (Chatham, N.J.: Chatham House, 1983); René Torenvlied, *Political Decisions and Agency Performance* (London: Kluwer Academic Publishers, 2000); Barry R. Weingast and Mark J. Moran, 'Bureaucratic Discretion or Congressional Control: Regulatory Policymaking by the Federal Trade Commission', *Journal of Political Economy*, 91 (1983), 765–80.

implementers is blurred. Thus, compliance with EU directives could also be viewed as a problem of enforcing international bargaining agreements.⁴

There is evidence of a paradox of compliance in the EU. When discussions are held in the Council of Ministers on directives proposed by the European Commission, these are often protracted and marked by controversy.⁵ Hence, decision outcomes often differ from the outcomes preferred by at least some member states. Such differences between preferred and actual outcomes can be thought of as member states' 'incentives to deviate' when implementing EU legislation.⁶ Cases of non-compliance with EU legislation appear to be less frequent than the incentives to deviate would suggest.⁷ According to the European Commission, at the end of 1982, 640 directives were in force with an average transposition rate of 89.58 per cent.⁸ In 2002, 2,240 directives were in force with an average transposition rate of 98.87 per cent. In addition, the European Court of Justice reports that it declared a total of 114 infringements concerning fourteen member states in 2004 (all old member states except Denmark).⁹ This is not a large number in relation to the entire body of EU legislation, and considering that Court infringement rulings relate not only to the non-implementation of legislation, but also to lack of adherence to Treaty obligations.

However, other reports suggest that non-compliance may be more widespread. The Commission's 2001 *White Paper on Governance* reports, for instance, that of the eighty-three internal market directives that should have been transposed in 2000, only five had been transposed in all member states.¹⁰ Such non-compliance may have substantial negative economic effects in certain sectors. The *White Paper* also calls for improvements in the implementation of EU legislation.

Furthermore, although the official statistics are worthy of attention, they may mask instances of non-compliance. Infringement proceedings refer to cases that are both detected by the Commission and on which the Commission decides to take action. There may be many other cases of non-compliance that do not show up in data on infringement proceedings. Likewise, data on transposition rates refer to member states' reports to the Commission on national laws. There is no guarantee that the national laws reported indeed transpose the directives adequately. In addition, full compliance is a broader concept, which includes appropriate policies by national agencies, and even appropriate behaviour by street-level bureaucrats delivering services to citizens. Infringements and transposition delays are therefore indirect measures of compliance. Nevertheless, if researchers are aware of these differences, it is appropriate to formulate and test explanations of variation in these official indicators, as we do in the present article. Infringements refer to cases of

⁴ James Fearon, 'Bargaining, Enforcement and International Cooperation', *International Organization*, 52 (1998), 269–305.

⁵ Bruce Bueno de Mesquita and Frans Stokman, eds, *European Community Decision-Making* (New Haven, Conn.: Yale University Press, 1994); Robert Thomson, Frans N. Stokman, Christopher H. Achen and Thomas König, eds, *The European Union Decides* (Cambridge: Cambridge University Press, 2006); Robert Thomson, Jovanka Boerefijn and Frans N. Stokman, 'Actor Alignments in European Union Decision Making', *European Journal of Political Research*, 43 (2004), 237–61.

⁶ Torenvlied, *Political Decisions and Agency Performances*.

⁷ Tanja A. Börzel, 'Non-compliance in the European Union: Pathology or Statistical Artefact', *Journal of European Public Policy*, 8 (2001), 803–24.

⁸ European Commission, *20th Annual Report on Monitoring the Application of Community Law* (2003).

⁹ Court of Justice of the European Union, *Statistics Concerning the Judicial Activity of the Court of Justice* (2004).

¹⁰ European Commission, *European Governance: A White Paper* (COM 428 final, 2001), p. 18.

non-compliance that became prominent enough for the Commission to notice and warrant action necessary. In addition, both infringements and delays can be examined over a relatively large number of cases, enabling generalizations to be tested in different policy areas and time periods. Consequently, the following section formulates hypotheses about variation in compliance, while discussing the particular characteristics of these indicators.

The existing literature offers two distinct approaches to explaining variation in compliance with EU legislation. The first approach offers state-based explanations and focuses on characteristics of member states, such as their administrative efficiency and institutional structures. The second approach, which in our view is currently less developed, offers preference-based explanations and focuses on national governments' policy preferences regarding those acts. This article develops explanations grounded in the second approach, and tests these while controlling for differences amongst member states.

State-based explanations suggest we should find marked differences amongst countries in their levels of compliance with EU laws. Obviously, characteristics of states cannot explain variation in compliance at the level of specific legislative acts. For instance, it has been argued that national administrative constraints prevent or slow down compliance.¹¹ Among such constraints, Mbye includes poverty, government inefficiency and corruption.¹² Similarly, Pridham refers to administrative problems encountered by Southern member states when implementing EU environmental law,¹³ while Coyle refers to the same problems in Ireland.¹⁴ Another group of state characteristics relates to multi-level governance. Levy *et al.* suggest that member states in which great authority is vested in central government find it easier to comply with international law than decentralized political systems.¹⁵ It has also been argued that national public opinion affects the implementation process. Lampinen and Uusikylä argue that it is easier to implement EU legislation in countries where there is public support for European integration.¹⁶ Falkner *et al.* condense national cultural factors into three inductively derived 'ideal-typical implementation styles' that cover the different member states: the 'world of law observance', the 'world of domestic politics', and the 'world of neglect'.¹⁷ Each of these state-based explanations suggests that over a broad range of legislative acts, the same countries systematically tend either to comply or not comply. Therefore, when examining variation in infringements and delays, we control for differences amongst countries.

The second approach offers preference-based explanations to explain variation in compliance. This approach focuses on the policy preferences of the governments charged

¹¹ See, for example, Abram Chayes and Antonia Chandler, 'Adjustment and Compliance in International Regulatory Regimes', in Jessica Tuchman Matthews, ed., *Preserving the Global Environment: The Challenge of Shared Leadership* (New York: Norton, 1990), pp. 280–308.

¹² Heather Mbye, 'Why National States Comply with Supranational Law: Explaining Implementation Infringements in the European Union, 1972–1993', *European Union Politics*, 2 (2001), 259–81.

¹³ Geoffrey Pridham, 'National Environmental Policy-making in the European Framework: Spain, Greece and Italy in Comparison', *Regional Politics and Policy*, 4 (1994), 80–101.

¹⁴ Carmel Coyle, 'Administrative Capacity and the Implementation of EU Environmental Policy in Ireland', *Regional Politics and Policy*, 4 (1994), 62–79.

¹⁵ Mark Levy, Oran Young and Michael Zürn, 'The Study of International Regimes', *European Journal of International Relations*, 1 (1995), 267–330.

¹⁶ Peter Lampinen and Petri Uusikylä, 'Implementation Deficit – Why Member States Do Not Comply with EU Directives', *Scandinavian Political Studies*, 21 (1998), 231–51.

¹⁷ Gerda Falkner, Oliver Treib, Miriam Hartlapp and Simone Leiber, *Complying with Europe: EU Harmonisation and Soft Law in the Member States* (Cambridge: Cambridge University Press, 2005).

with implementing EU legislation. Unlike state-based explanations, this approach can explain why a given member state complies with one directive but not another. Several studies refer to member states' preferences. However, none link member states' preferences with the amount of discretion granted to states, as we do in this article. Falkner *et al.* examine the extent to which non-compliance is attributable to opposition expressed by member states at the decision-making stage prior to the adoption of EU legislation, which they refer to as 'opposition through the backdoor'.¹⁸ They find little evidence for this explanation in the six directives they examine. Similarly, Mbaye suggests that qualified majority voting in the Council may be associated with more infringements because states may be compelled to implement policies they did not vote for.¹⁹ Mbaye therefore uses the Council decision rule as a proxy for agreement with the outcomes of negotiations. In addition, it has been suggested that 'policy fit', the extent to which European legislation fits the provisions of existing national legislation, plays an important role.²⁰ As with states' preferences, policy fit may vary amongst directives.

Preference-based explanations build on evidence from other political systems, which shows that mandate characteristics affect implementation.²¹ In addition, studies of international relations also reveal that characteristics of international negotiations have strong effects on the ratification and implementation of international treaties. When considering the enforcement of international bargaining agreements, Fearon argues that agreements that are further from states' ideal points are less likely to be implemented faithfully.²²

This article makes a theoretical and empirical contribution to the existing literature on compliance with EU legislation. In terms of theory development, we refine a preference-based explanation of non-compliance that incorporates the concept of discretion. Discretion refers to the room for manoeuvre member states are given in the directives they are charged with implementing. This builds on the work of Franchino, which explains variation in discretion.²³ We test hypotheses with data on the available indicators of compliance, the likelihood of infringement proceedings and the timing of national implementing measures. In terms of research design, our selected cases include directives with and without infringements, and with and without transposition delays. This avoids selecting on the dependent variable, thereby examining only directives that were not complied with. In terms of measurement, we measure preference-based incentives to deviate from the provisions of directives far more directly than has previously been possible. These data enable stronger and more direct tests of the impact of preferences.

¹⁸ Gerda Falkner, Miriam Hartlapp, Simone Leiber and Oliver Treib, 'Non-Compliance with EU Directives in the Member States: Opposition through the Backdoor?' *West European Politics*, 27 (2004), 452–73.

¹⁹ Mbaye, 'Why National States Comply with Supranational Law'.

²⁰ Adrienne Héritier, 'The Accommodation of Diversity in European Policy Outcomes: Regulatory Policy as a Patchwork', *Journal of European Public Policy*, 20 (1996), 83–103; Tanja A. Börzel and T. Risse, 'Conceptualising the Domestic Impact of Europe', in K. Featherstone and C. Radelli, eds, *The Politics of Europeanization* (Oxford: Oxford University Press, 2003), pp. 57–80.

²¹ Laurence J. O'Toole Jr., 'Research on Policy Implementation: Assessment and Prospects', *Journal of Public Administration Research and Theory*, 10 (2000), 263–88; Torenvlied, *Political Decisions and Agency Performances*.

²² Fearon, 'Bargaining, Enforcement and International Cooperation'.

²³ Fabio Franchino, 'Delegating Powers in the European Community', *British Journal of Political Science*, 34 (2004), 269–93.

THE IMPACT OF PREFERENCES AND DISCRETION ON COMPLIANCE

Our hypotheses specify the expected relationships between member states' incentives to deviate, the level of discretion granted in directives, and the likelihood of compliance. We aim to explicate the mechanisms that feed characteristics of the decision-making stage, prior to the adoption of directives, into the transposition and implementation stage, after the adoption of directives. After formulating the hypotheses in terms of compliance, we discuss the particular characteristics of the indicators that are available, infringements and delays.

We first define member states' preference-based incentives to deviate. Suppose that the controversy raised by a Commission proposal can be represented by a policy scale (or multidimensional policy space if there are several independent controversies). Examples of such policy scales are given in Figure 2 and will be discussed in the next section. The size of a member state's incentive to deviate is defined as the distance between its position and the actual decision outcome on the policy scale. If a member state's preference is the same as the decision outcome, it has no incentive to deviate in implementation. Full compliance with a directive implies that each member state implements exactly the decision outcome contained in the directive. Some directives, however, may stipulate a range of policy measures that member states can take. In such cases, compliance implies that member states implement policies within the discretionary boundaries specified in the directive.²⁴

Our first working hypothesis concerns the effect of member states' incentives to deviate on compliance.

HYPOTHESIS 1: Member states with higher preference-based incentives to deviate are less likely to comply.

This hypothesis has been examined in previous analyses, although indirectly or with a small number of cases. For instance, Mbaye assumes that member states have smaller incentives to deviate from decisions taken by the unanimity rule in the Council than from decisions taken by qualified majority voting, since each member state could veto legislation it disagrees with under unanimity voting.²⁵ She finds no support for this hypothesis. One explanation for this finding could be that it is based on a very indirect and imperfect measure of member states' incentives to deviate.

The first hypothesis does not take into account an important characteristic of directives, the level of discretion granted in the directives' provisions. Discretion is expected to affect compliance directly and in combination with member states' incentives to deviate. Consider first the direct effect of discretion on compliance. Executive discretion refers to the granting of discretionary powers to the agencies charged with implementing a decision. Higher levels of discretion increase the discretionary boundaries around the decision outcomes contained in the directives.²⁶ Thus, when higher levels of discretion are granted to member states, wider ranges of policy performances are compatible with

²⁴ Torenvlied, *Political Decisions and Agency Performances*.

²⁵ Mbaye, 'Why National States Comply with Supranational Law', p. 263.

²⁶ Jonathan Bendor and Adam Meirowitz, 'Spatial Models of Delegation', *American Political Science Review*, 98 (2004), 293–310, p. 299.

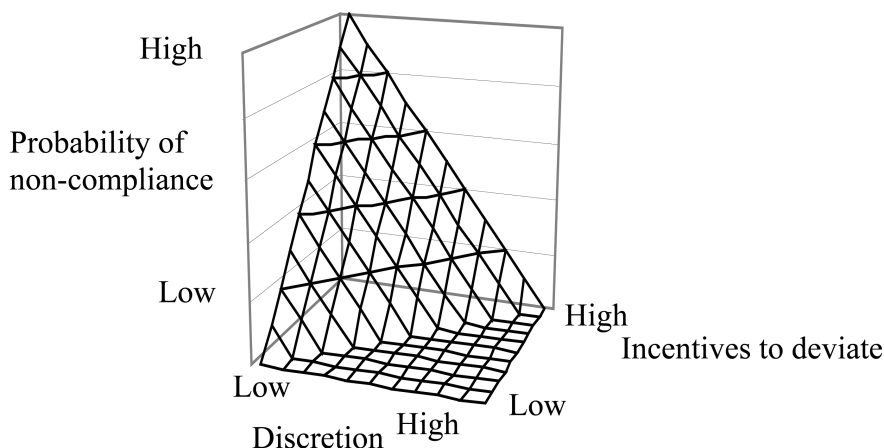


Fig. 1. Expected relationship between incentives to deviate, discretion and the probability of non-compliance

the decision outcomes contained in the directives. We therefore propose the following hypothesis:

HYPOTHESIS 2: Directives that grant high levels of discretion to member states are more likely to be complied with.

Existing research shows that discretion and political controversy are linked, but that the nature of this linkage varies. Studies on delegation in political systems other than the EU have found that high levels of policy conflict amongst decision makers are associated with the granting of low levels of discretion to implementation agencies. The explanation for this is that decision makers who disagree with each other invest more heavily in instruments for monitoring and controlling implementation agencies.²⁷ However, Franchino's research on the EU concludes that high levels of policy conflict amongst member states are associated with high levels of discretion to member states.²⁸ This suggests that in the EU, discretion is granted in the implementation stage to avoid deadlock at the decision-making stage. Consequently, it is necessary to include both discretion and states' incentives to deviate in the analysis.

We also expect discretion to affect the impact that states' incentives to deviate have on compliance. Member states' incentives to deviate are a necessary but not sufficient condition for non-compliance. The translation of incentives to deviate into actual policy deviations depends on the structure of the implementation process, part of which is defined

²⁷ David Epstein and Sharyn O'Halloran, *Delegating Powers: A Transaction Costs Politics Approach to Policy Making Under Separate Powers* (Cambridge: Cambridge University Press, 1999); John D. Huber and Charles R. Shipan, *Deliberate Discretion? The Institutional Foundations of Bureaucratic Autonomy* (New York: Cambridge University Press, 2002); Bendor and Meirowitz 'Spatial Models of Delegation'. In a separate paper we focus on discretion as the dependent variable, examining the factors that influence the level of discretion granted to member states and the Commission in directives.

²⁸ Franchino, 'Delegating Powers in the European Community', p. 290.

by discretion.²⁹ Such conditional variables mediate the effects of the characteristics of bargaining at the decision-making stage.³⁰ Our third hypothesis is that:

HYPOTHESIS 3: Member states with high preference-based incentives to deviate are less likely to comply with directives that grant low levels of discretion than with directives that grant high levels of discretion.

Figure 1 depicts the third hypothesis on the impact of member states' incentives to deviate and discretion on compliance. Although the exact functional form of the relationship is open to question, we expect to find cases of non-compliance when member states have high incentives to deviate, but are granted low levels of discretion. We will, therefore, investigate interactions between incentives to deviate and levels of discretion in addition to their direct effects.

The hypotheses refer to the expected effects of incentives to deviate and discretion on compliance. As mentioned above, we test these hypotheses using infringements and delays. These indicators clearly refer to aspects of the compliance process and are indirect measures of compliance available to us in the present study. Thus, it is important to consider the particular features of these indicators in relation to the hypotheses being tested.

Infringements refer to the initiation of infringement proceedings by the Commission against member states for failure to implement or implement correctly a particular directive. As such, infringements are the Commission's actions in response to the cases of non-compliance it detects and that it chooses to pursue. So infringements underestimate the number of cases of non-compliance.³¹ Admittedly, this makes infringements a rough indicator. However, it is not our intention to estimate the number of cases of non-compliance, but to explain variation in compliance. Infringements refer to the cases that are deemed serious enough to be brought to the Commission's attention and to be pursued.

The Commission's decisive role in initiating infringement proceedings makes it necessary to include the Commission's policy preferences in the analysis. Like the other actors involved in the decision-making process prior to the adoption of directives, the Commission prefers some decision outcomes more than others. The extent to which the Commission agrees with the provisions of a directive may affect its propensity to launch infringements against states. A preference-based explanation suggests that the Commission is less likely to start infringement proceedings in response to non-compliance if it disagrees more with the contents of a directive. Given the Commission's limited resources, it might concentrate on enforcing the implementation of directives it agrees with most. However, a reputation-based explanation could lead to the opposite expectation regarding the direction of the effect. For example, the Commission is keen to be seen as impartial in its monitoring and enforcement of European law, and may therefore invest extra effort in bolstering this image when it disagrees with the content of a directive. Given

²⁹ McCubbins, Noll and Weingast, 'Structure and Process as Solution to the Politician's Principal–Agency Problem'.

³⁰ W. N. Eskridge Jr and J. A. Ferejohn, 'Making the Deal Stick: Enforcing the Original Constitutional Structure of Lawmaking in the Modern Regulatory State', *Journal of Law, Economics and Organization*, 8 (1992), 165–89; J. A. Ferejohn and B. R. Weingast, 'A Positive Theory of Statutory Interpretation', *International Review of Law and Economics*, 12 (1992), 263–79; Fearon, 'Bargaining, Enforcement and International Cooperation'.

³¹ Falkner, Treib, Hartlapp and Leiber, *Complying with Europe*, p. 202.

these competing arguments, we recognize the importance of including the Commission's disagreement, but treat its effect as an open empirical question.

Delays refer specifically to the transposition stage of the compliance process. In particular, delays refer to the extent to which the national implementing measures reported by member states came into effect after the deadlines specified in the directives. This is an important indicator since the transposition of European directives into national laws is the first step in the compliance process. The obvious distinguishing characteristic of delays is that they refer to the timing rather than the quality of transposition. Delays are likely to be affected by the duration of the decision-making processes at the national level prior to the adoption of the national implementing measures. The duration of these processes may be affected by discretion. High levels of discretion mean that national policy makers can select the outcomes of national legislation from a range of policy alternatives that are consistent with the European directive's provisions. On tightly-defined directives, by contrast, national policy makers face fewer choices, which could speed up the process. Thus, we expect discretion to be associated with fewer infringements but longer delays.³² We examine these different effects on the two commonly used measures of compliance in an integrated design, enabling us to examine the possible differences in effects.

RESEARCH DESIGN

We examine a dataset that contains information on twenty-four directives. For each of these directives the dataset contains detailed information on our independent variables: the extent to which each member state and the Commission disagreed with the provisions of each directive, and the amount of discretion each directive grants to the member states. The dataset also contains information on infringement proceedings and transposition delays for each of the fifteen (pre-2004 enlargement) member states in relation to each of the twenty-four directives. This information makes the dataset unique in terms of the detail it provides on the content of the directives and on member states' preferences on the controversies raised by the directives.

Selection of Commission Proposals

The twenty-four directives were carefully selected to generate variation in the main independent variable in our analyses, the extent to which member states disagree with the content of directives. Thus, our study does not aim to provide generalizations about the current state of EU implementation, as would follow from a sampling logic. The selection criteria are the same as those applied in the project 'Decision Making in the European Union', details of which can be found in Stokman and Thomson, and Thomson *et al.*³³ Three selection criteria were applied. First, the Commission proposals included were subject to either the consultation or the co-decision procedure. The selection was confined to those that did not change legislative procedure after the Amsterdam Treaty came into effect on 1 May 1999. Secondly, the selection covers Commission proposals discussed in the Council in the period January 1999–December 2000. As will be discussed below

³² We thank Marco Giuliani for pointing out the different mechanisms that underlie the different effects of discretion on infringement proceedings and transposition delay.

³³ Frans N. Stokman and Robert Thomson, 'Winners & Losers in the European Union', *European Union Politics*, 5 (2004), 5–24; Thomson *et al.*, eds, *The European Union Decides*.

regarding the measurement of controversy in relation to each directive, interviews with key informants were required. Since the decision situations the informants were asked to describe had to be relatively recent and fresh in their memories, the time period covered had to be relatively recent. Thirdly, the selected directives had to raise some minimum level of controversy. Before the inclusion of a Commission proposal in the selection, it had to have been mentioned in *Agence Europe*, the main independent daily news service covering EU affairs. This procedure avoided the selection of very technical Commission proposals that were of only marginal political importance. After the identification of a report in *Agence Europe*, it was included provisionally in the selection. A policy area expert was then contacted and asked for advice on the proposal. If the proposal did not raise any controversy whatsoever, it was not included in the selection; if it did, the proposal was included.³⁴

The selection of cases is broad in the sense that it contains variation in policy areas and levels of controversy, but limited in that it refers to cases from a fairly recent time period. The policy areas covered, as defined by the relevant Council configuration that dealt with them, consist of internal market (nine directives), economic and financial affairs (five directives), agriculture (three directives), transport (three directives), justice and home affairs (one directive), employment (one directive), energy (one directive) and health (one directive). Some of the selected directives were highly controversial within the policy sectors concerned. For example the directive on tobacco products (2001/37/EC) pitched public health interests against the interests of the tobacco industry. Other selected directives were agreed on with relatively little controversy. For example, the directive on the transport of dangerous goods (2000/61/EC) was mainly technical, although it did raise some disagreement about whether this could be best dealt with at the national or European levels. Such variation in the level of disagreement associated with each directive is essential to assessing the impact of member states' policy preferences.

The directives have transposition deadlines between 1999 and 2004. These refer to the dates on which member states were legally obliged to have effective national implementing measures. Seven directives have deadlines in 2001 or earlier, ten in 2002, six in 2003 and one in the first half of 2004. Our data were last updated at the end of June 2006, which means that for most of the directives included, we examine the record of infringements and delays for the three to four years after the deadlines. Although a relatively short time period, this is long enough to pick up on several infringement proceedings and to detect delays in transposition. If we were to repeat this exercise in a few years' time, there would probably be more infringements, and some of the directives not yet transposed would be transposed.

³⁴ From twenty-six originally selected directives, two directives are not included in our study because they are not suitable for examination in terms of compliance at the time of writing: one was rejected by the European Parliament and another has a transposition date in 2006. These are the proposed directive on takeover bids (COD/1995/341) and directive 2001/84/EC on resale rights for artists. In addition to the six directives listed in Table 2, the following eighteen are included in the selection. Directive 1999/105/EC on forest material, directive 2000/20/EC on bovine animals and swine, directive 2001/112/EC on fruit juices, directive 1999/44/EC on consumer guarantees, directive 2000/26/EC on motor insurance, directive 2001/29/EC on copyright, directive 1999/93/EC on electronic signatures, directive 2000/31/EC on electronic commerce, directive 2001/5/EC on food additives, directive 1999/81/EC on taxes on cigarettes, directive 2000/46/EC on electronic money institutions, directive 1999/49/EC on VAT, directive 1999/85/EC on VAT on labour-intensive services, directive 2001/4/EC on VAT, directive 2000/78/EC on equal treatment, directive 2000/55 on energy efficiency, directive 2000/61/EC on transport of dangerous goods, directive 2001/16/EC on interoperability of the rail system.

Infringements and Delays

The initiation of infringement proceedings by the Commission against a member state is the first indicator examined. Infringement proceedings were identified by reviewing the *Annual Report of the Application of Community Law* for each of the years from 1999 to 2003, and all decisions taken by the Commission up until 7 June 2006. All infringement proceedings in which the Commission sent a Reasoned Opinion to a member state were included. It would be inappropriate in our view to distinguish amongst infringement proceedings by the time it took to resolve them or the stage they reached. The duration and stage of the infringement proceeding is a strategic decision on the part of the member state, and not necessarily a reflection of the severity of the infringement. Some of these infringement proceedings were withdrawn after the member state in question responded adequately according to the Commission, and some are still pending. None of the infringements has yet been the subject of a ruling by the European Court of Justice.

A second indicator of compliance is provided by the timing of the national implementing measures. We identified the dates on which the national implementing measures taken by each member state came into force. We then compared these dates with the deadline for transposition specified in the directive, usually eighteen months after the adoption of the directive. National implementing measures reported in the Commission's CELEX or EUR-Lex databases on 27 June 2006 were included. Member states often report several national implementing measures in response to a single directive, each implementing the measure with a different date. This is due to the fact that transposition is a process that can involve the adjustment of several aspects of a country's legislative regime. We take the date of the earliest national implementing measure to estimate the length of delay. Therefore, our measure of delay is more accurately described as delay in the start of the transposition process, which may consist of several national implementing measures. Of course, this is also an indirect measure of compliance since the existence of a national implementing measure is no guarantee that their provisions are congruent with the provisions of the directive in question. We also examine a third, related measure of compliance: whether or not each member reported any national implementing measures in relation to each directive.

Discretion

The measure of discretion applied follows Franchino's adaptation of Epstein and O'Halloran's measure of executive discretion.³⁵ We calculated the discretion ratio, which is the number of major provisions in a legislative act that grant discretionary executive powers to member states divided by the total number of major provisions in the act. A provision grants discretionary executive powers to states if it allows states to choose whether or not to take a particular action, or to take one of a number of actions. For example, the directive on consumer goods and associated guarantees (1999/44/EC) states that 'Member States *may* provide that, in order to benefit from his rights, the consumer must inform the seller of the lack of conformity [with the contract] within a period of two months from the date on which he detected such lack of conformity' [emphasis added]

³⁵ Franchino, 'Delegating Powers in the European Community'; Epstein and O'Halloran, *Delegating Powers*, pp. 90–112.

(Article 5.2). This provision gives member states the discretion to impose an additional burden on consumers when exercising their rights.³⁶

Incentives to Deviate

The measure of preference-based incentives to deviate identifies the extent to which each member state disagreed with the contents of each directive. It is the distance on a policy scale between the member state's most preferred outcome and the decision outcome contained in the adopted directive.³⁷ We base this measure on member states' policy preferences on the directive when it was a proposal.³⁸ Key informants were interviewed to identify the controversial issues at the proposal stage, as depicted in Figure 2, which refers to the proposed tobacco products directive. This method has been applied in a wide variety of studies of decision making.³⁹

Forty informants provided information on the twenty-four directives concerning the controversial issues and actors' preferences on those issues. Twenty-nine of the informants were desk officers from the permanent representations of the member states; the others were Commission officials. Each informant was intimately familiar with the decision-making processes on the directives on which they provided information. The interviews lasted on average 100 minutes each. The validity and reliability of the informants' judgements were examined by comparing their judgements with information from Council documentation, and by comparing judgements from different informants.⁴⁰ The tests indicate satisfactory levels of validity and reliability. These tests show, for instance, that of all the points of discussion raised in the Council, key informants generally focus on issues that are more controversial, and that are more difficult to resolve. These are exactly the kinds of issues most relevant to assessing the impact of member states' incentives to deviate on compliance. Informants' estimates of actors' policy preferences sometimes differ from information reported in Council documentation. On examination, these differences are due to the fact that Council documents do not refer to policy preferences, but to the decision outcomes actors were prepared to accept during the course of the negotiations. In addition, König *et al.* compared thirty-one point estimates provided by these key informants' with estimates from informants in the European Parliament and found that thirty match perfectly or almost perfectly.⁴¹

The first step in the interview process consisted of describing the political problem as a series of issue scales. As indicated in Figure 2, controversial issues are viewed as issue continua or scales. The proposed directive on the manufacture, presentation and sale of tobacco products (COD/1999/244) aimed to harmonize certain requirements that cigarettes

³⁶ Franchino's measure of executive discretion also includes a 'constraint ratio' that includes information on the number of constraints to which member states' executive discretion is subject. Here, we employ the simpler discretion ratio.

³⁷ Torenvlied, *Political Decisions and Agency Performances*.

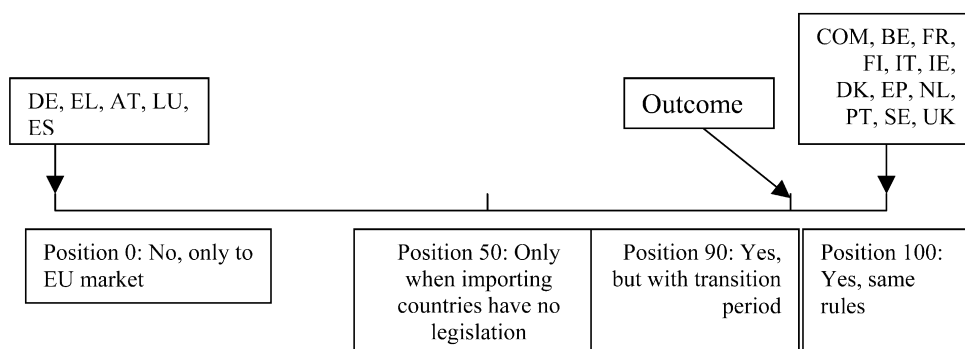
³⁸ See Stokman and Thomson, 'Winners & Losers in the European Union', and Thomson *et al.*, eds, *The European Union Decides*, for more details.

³⁹ Bueno de Mesquita and Stockman, eds, *European Community Decision-Making*; Bruce Bueno de Mesquita, *Principles of International Politics* (Washington, D.C.: CQ Press, 2005) also contains an extensive discussion of other studies that use this approach.

⁴⁰ Robert Thomson, 'Comparison of Expert Judgements with Each Other and with Information from Council Documentation', in Thomson *et al.*, *The European Union Decides*.

⁴¹ Thomas König, Björn Lindburg, Sandra Lechner and Winfried Pohlmeier, 'Bicameral Conflict Resolution in the European Union: An Empirical Analysis of Conciliation Committee Bargains', *British Journal of Political Science*, 37 (2007), 281–312.

Issue 1: Should EU rules on maximum yield levels for tobacco products apply to products intended for export outside the EU?



Issue 2: How strong should the health warning be on tobacco products?

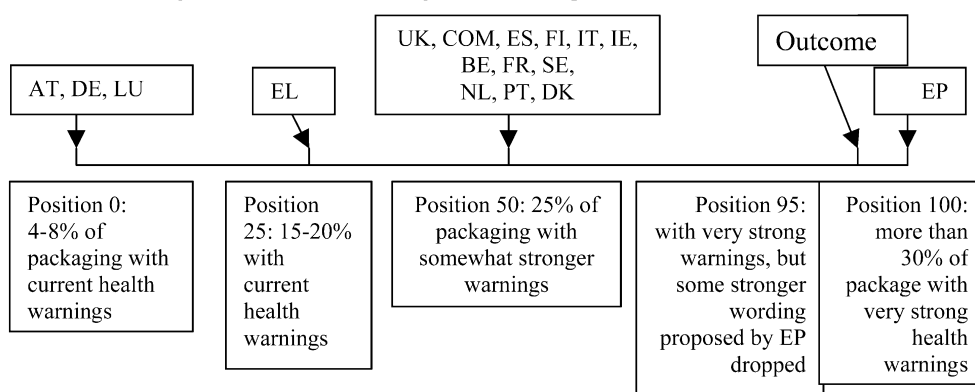


Fig. 2. The tobacco products directive (COD/1999/244): two of the issues specified by informants

Key: AT = Austria, BE = Belgium, COM = Commission, DE = Germany, DK = Denmark, EL = Greece, EP = European Parliament, ES = Spain, FI = Finland, FR = France, IE = Ireland, IT = Italy, LU = Luxembourg, NL = The Netherlands, PT = Portugal, SE = Sweden, UK = United Kingdom.

produced in the EU must meet. Interviews were held with four key informants on this proposal. Five issues were identified that, in their view, capture the main elements of the discussions on this proposal, two of which are depicted in Figure 2. These two issues illustrate the main criteria an issue specification must meet. Each of the issue continua is uni-dimensional, and each actor who has an interest in the issue can be placed on a point on the continuum to represent the position it favours. Points on the scale that lie further away from an actor's position are evaluated more negatively by that actor. The two extreme positions on each issue continuum represent the most extreme positions considered in the negotiations. Intermediate positions represent more moderate positions and also possible compromise outcomes.

After they had identified the issues, the informants were asked to indicate the policy alternative 'initially favoured by each stakeholder after the introduction of the proposal before the Council formulated its common position'. The actors were placed on the issue continua to represent the alternatives they favoured most. On the issue of whether EU rules

on yield levels should apply to cigarettes manufactured for export outside the EU, the informants indicated that Germany, Greece, Spain, Luxembourg and Austria were initially against this, while the other actors were in favour. States that opposed the application of EU rules argued that this directive was an internal market directive (Article 95), and that goods intended for export had no bearing on the internal market. Further, it was argued that this could lead to the relocation of tobacco manufacturing beyond the EU.

The measure of each member state's incentive to deviate is based on the absolute distance between that state's initial preferences and the decision outcomes embodied in the directive that was adopted. In Figure 2, for example, Germany has a distance of 90 from the outcome on Issue 1 and a distance of 95 on Issue 2. We take the highest absolute distance between the member state's position and the decision outcome across the issues of the proposal as a measure of the incentive to deviate. The reasoning behind taking the maximum, rather than the mean average distance across the issues in a proposal, is that a member state only needs to disagree vehemently with one of the decision outcomes contained in the directive to have an incentive not to comply with the directive.

This procedure implies that distances from different issues and different directives are comparable to the extent that they provide indicators of member states' relative incentives to deviate. This is a justifiable assumption based on the application of the same data-collection procedures to each case. Further, each of the controversial issues is standardized to range from 0 to 100. Note that on some issues the status quo position is represented by position 0, while all member states prefer some policy change and take positions greater than 0. This increases the comparability of the distances on the issue scales. Nevertheless, we do acknowledge that a distance of 20 scale points on one issue may be associated with more profound social and economic effects than a distance of 20 scale points on another issue. The distances refer to the political distances between alternative outcomes relative to the range of actors' preferences. Therefore, we consider the distances to be comparable in relation to the range of actors' preferences, not as absolute measures of the substantive differences between alternative decision outcomes.

'Worlds of Compliance', National Differences and Policy Fit

We test our preference-based explanation of compliance alongside other explanations in the existing literature. Most of these refer to factors that vary among member states. One explanation refers to distinct 'worlds of compliance' in different member states.⁴² We introduce dummy variables that group together member states for each of these 'worlds' in accordance with Falkner *et al.*'s typology: the 'world of law observance' contains Denmark, Sweden and Finland, the 'world of domestic politics' contains Austria, Belgium, Spain, Germany, United Kingdom and Netherlands, and the 'world of neglect' contains Greece, Portugal, Luxembourg, France, Ireland and Italy. In addition, existing country-specific explanations refer to other variables that vary mainly across member states: administrative constraints such as inefficiency and corruption, and the degree of centralization at the national level. We therefore introduce member state dummy variables to examine variation across member states. Finally, another explanation referred to above refers to the fit between new European legislation and existing national legislation.⁴³

⁴² Falkner *et al.*, *Complying with Europe*.

⁴³ Héritier, 'The Accommodation of Diversity in European Policy Outcomes'; Börzel and Risse, 'Conceptualising the Domestic Impact of Europe'.

Unlike the state-based explanations, policy fit can differ within countries across a set of directives. As an indicator of policy fit, we identify whether or not the national implementing measures came into force prior to the adoption of the directives to which they refer. If a member state already had in place legislation in line with the directive's provisions, it is assumed that its existing legislative regime needed relatively little change in response to the new directive. We do not pretend that this measure allows a refined test of the impact of fit. It does, however, provide a way of controlling for policy fit when examining the impact of other variables of interest.

RESULTS

Infringement Proceedings

Table 1 shows that the occurrence of infringement proceedings is relatively rare in relation to the total number of directives and the total number of policy performances by member states. Of the twenty-four directives selected for this study, infringement proceedings were launched in relation to six. A total of nineteen infringement proceedings were initiated in relation to these six directives.

TABLE 1 *Infringement Proceedings Initiated by the European Commission on a Selection of Twenty-four Directives*

	<i>N</i>	Infringement	No infringement
Directives	24	6 (25.0%)	18 (75.0%)
Policy performances of EU-15 member states	360	19 (5.3%)	336 (94.7%)

State-based explanations cannot account for the observed pattern of infringement proceedings. Table 2 shows that each of the EU-15 member states had an infringement proceeding initiated against it in connection with either one or two of these six directives. Austria, Finland, Italy and the United Kingdom had infringement proceedings initiated against them on two of the six directives; each of the other member states had one infringement proceeding directed against it. There is more variation amongst directives in the number of infringement proceedings of which they were the subject. Three of these six directives, 'tobacco', 'displaced persons' and 'chocolate' were each the subject of only one infringement proceeding, while 'buses', 'honey' and 'hens' were the subject of five or six infringements. This suggests that characteristics of the directives, rather than country-specific variables, explain the initiation of an infringement proceeding.

In line with our hypotheses, Figure 3 suggests that both incentives to deviate and discretion affect the likelihood of infringement proceedings. Figure 3 depicts the level of discretion and the average incentive to deviate for the six directives with infringement proceedings and the eighteen directives without. Directives further to the right of Figure 3 are more disputed; they contain decision outcomes that, on average, lie further from member states' preferences. Directives further to the bottom of Figure 3 grant less discretion to states in defining the content of their national implementing measures. Directives with infringements tend to have high average incentives to deviate and low

TABLE 2 *The Six Directives on which Infringement Proceedings were Initiated and the Member States towards which these were Directed*

Short name of directive	Directive	Infringement proceedings launched against
Buses	Directive 2002/7/EC of the EP and Council amending Council Directive 96/53/EC laying down for certain road vehicles circulating within the Community the maximum authorized dimensions in national and international traffic and the maximum authorized weights in international traffic	EL, LU, PT, ES, SE
Tobacco	Directive 2001/37/EC of the EP and Council on the approximation of the laws, regulations and administrative provisions of the member states concerning the manufacture, presentation and sale of tobacco products	FI
Displaced persons	Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between member states in receiving such persons and bearing the consequences thereof	IE
Honey	Council Directive 2001/110/EC relating to honey	AT, BE, DE, IT, UK
Hens	Council Directive 1999/74/EC laying down minimum standards for the protection of laying hens	AT, DK, FI, FR, NL, UK
Chocolate	Directive 2000/36/EC of the EP and Council of 23 June 2000 relating to cocoa and chocolate products intended for human consumption	IT

Note: See key to Figure 2 for names of member states.

levels of discretion. Thus, the data at the level of the directives are consistent with our three hypotheses when applied to infringement proceedings.

We now move the analysis from the level of the twenty-four directives to the level of the fifteen member states. With fifteen states and twenty-four directives, there are a possible 360 observations of the presence or absence of an infringement proceeding. There were, however, six member state-directive combinations in which the member state took no positions on the issue or issues raised by the directive. We therefore have 354 observations of member states' incentives to deviate from the twenty-four directives.

The second column of Table 3 compares cases with infringements and those without infringements with respect to member states' incentives to deviate. On directives with infringements, states' incentives to deviate are on average higher (56.32) than on directives without infringements (44.15). A non-parametric test shows that this difference is statistically significant ($p < 0.10$), which is noteworthy considering the skewed distribution of the infringement variable. Table 3 also compares the cases with infringements and those without in relation to the discretion granted to member states in the directives.

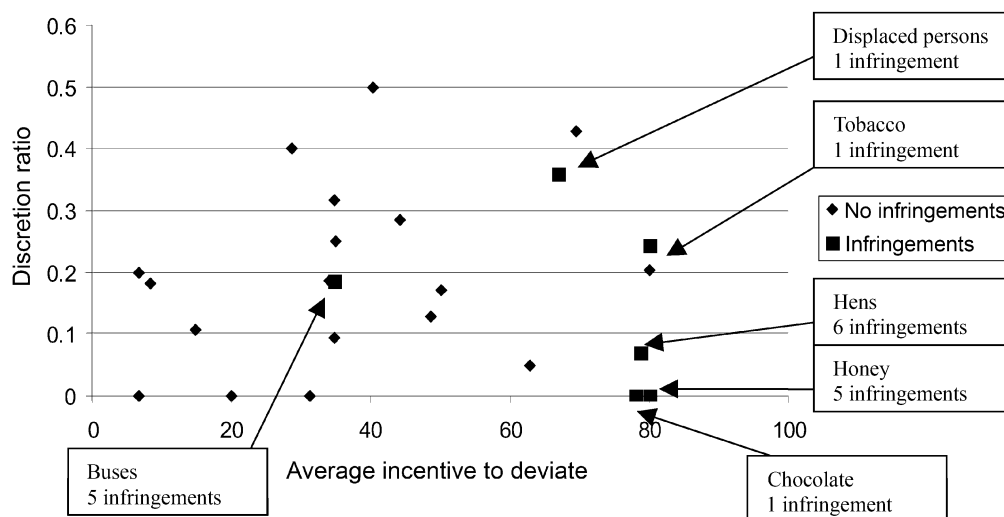


Fig. 3. What distinguishes directives with infringements from directives without?

TABLE 3 *Comparisons of Directives With Infringements and Those Without Infringements for Three Independent Variables*

	Member state's incentive to deviate	N	Discretion ratio	N	Commission's disagreement with directive	N
No infringements	44.15 (33.27)	335	0.19 (0.14)	341	36.28	341
Infringements	56.32 (33.37)	19	0.10 (0.10)	19	53.25	19
<i>P</i>	0.08		0.03		0.00	

Notes: A non-parametric test, the Mann Whitney U-test, was applied to estimate the probability that the differences between the two groups are due to chance. The *p*-values reported are two-tailed. Standard deviations are shown in parentheses.

This comparison confirms that infringements are associated with significantly less discretion, in line with the second hypothesis.

The third hypothesis stressed the contingent nature of the effect of member states' incentives to deviate on the likelihood of compliance. In particular, higher incentives to deviate are expected to be associated with a higher likelihood of non-compliance when states are given little discretion. In Table 4 the 354 cases are divided into two roughly equally-sized groups. The first group has a low level of discretion and the second has a high level of discretion, with the mean level of discretion as the point of division. In accordance with our expectation, in cases where low levels of discretion are granted, member states' incentives to deviate are significantly higher in cases with infringements than in cases without infringements. Intriguingly, in cases with high levels of discretion there are higher incentives to deviate in the cases with infringements than in cases without infringements. However, the difference is only marginally significant.

TABLE 4 *Infringements are Directed towards Member States with Significantly Higher Incentives to Deviate, but Only if Directives Grant Low Discretion*

	Low discretion		High discretion	
	Member state's incentive to deviate	N	Member state's incentive to deviate	N
No infringements	40.98 (33.65)	164	47.19 (32.70)	171
Infringements	75.00 (21.11)	12	24.29 (25.07)	7
P	0.00		0.09	

Note: The Mann Whitney U-test was applied to estimate the probability that the differences between the two groups are due to chance. The *p*-values reported are two-tailed. Standard deviations are shown in parentheses.

TABLE 5 *Logistic Regression Analysis of the Likelihood of Infringements*

	<i>b</i> (s.e.)	Exp(<i>b</i>)
Member state's incentive to deviate	0.030** (0.013)	1.030
Discretion ratio	0.030 (0.044)	1.031
Member state's incentive × discretion	− 0.002* (0.001)	0.998
Commission's disagreement with directive	0.051*** (0.015)	1.052
Policy fit (1 = fit; 0 = no fit)	1.591** (0.756)	4.911
Constant	− 6.220*** (1.320)	0.002
N	354	
Model χ^2 (df)	30.899 (5)***	

Note: The discretion ratio has been multiplied by 100 to facilitate interpretation. Standard errors in parentheses. **p* = 0.05; ***p* = 0.01; ****p* = 0.001.

The bivariate relationships described above are confirmed in a multivariate logistic regression presented in Table 5.⁴⁴ Member states' incentives to deviate have a positive effect on the likelihood of infringements. The exponent of the first coefficient, 1.03, indicates that for directives that grant no discretion, every one unit increase in a state's incentive to deviate is associated with an increase of 3 per cent in the likelihood of an infringement proceeding. The significant negative interaction term indicates that high discretion reduces the impact of incentives to deviate on the likelihood of infringements. In addition, the model shows that the extent to which the Commission disagrees with a directive has a positive impact on the likelihood of infringements. For every one-unit increase in the distance between the Commission's preferred outcome and the actual decision outcome, there is an average 5.2 per cent increase in the likelihood of an infringement proceeding. Finally, the coefficient associated with the policy fit variable indicates that infringement proceedings are more likely to be launched against member

⁴⁴ We performed several analyses to test the robustness of the estimated effects in Table 5. We applied the Jackknife estimation procedure. We included a random effect at the level of the member states in a cross-classified model to take into account the nested structure of the data. We also estimated the model without the policy-fit indicator. There were no differences in the direction or significance of the effects.

states that already had national provisions relating to the directives in place before the adoption of the directives.

Transposition Delays

We now turn to the timing of national implementing measures. The timeliness of national transposition is distinct from infringements, and we would therefore expect different dynamics to be at play. Table 6 shows that, on average, policy performances that are the subject of infringements are subject to somewhat shorter transposition delays. However, there is much variation and no significant difference between the cases with and without infringements. Note that when we consider all directives, including those for which no national implementing measures have been reported, the transposition delays are much longer than when we consider only transposed directives. When there are no national implementing measures, the delay is defined as the number of weeks between the deadline specified in the directive and the date on which we last checked the Commission's databases (27 June 2006).

TABLE 6 *Infringement Proceedings and Transposition Delays*

	All directives: average weeks of delay (standard deviation)	<i>N</i>	Only transposed directives: average weeks of delay (standard deviation)	<i>N</i>
No infringements	79.01 (125.26)	322	18.88 (30.92)	253
Infringements	23.29 (44.97)	16	12.70 (15.75)	15
<i>P</i>	0.24		0.94	

Note: The 'Only transposed directives' column excludes directives for which no reference to any national implementing measures was available in EUR-Lex on 27 June 2006, the last date on which the Commission's database was consulted. The 'All directives' column includes these cases, and calculates delay as the number of weeks between the deadline and 27 June 2006. For some directives, the EUR-Lex database includes a reference to a national implementing measure, but does not indicate when that measure came into force; these cases are considered missing.

Figure 4 depicts the substantial variation amongst member states in their average delays in transposing directives. This is in line with the state-based explanations referred to above. The obvious variation amongst states makes it imperative to examine differences amongst states when performing the multivariate analyses. The information from Figure 4 is fully consistent with that of previous, more representative studies that identified Sweden, Denmark and Finland as relatively efficient implementers of European legislation. All of the member states reported national implementing measures for most of the twenty-four directives in our selection. Ireland and Luxembourg reported national implementing measures for fewer directives (sixteen) than the other member states. Intriguingly, Greece, which has the longest delays in implementing this selection of measures, also reported national implementing measures for most directives (twenty-two). In the subsequent analyses, we therefore include country variables to examine whether country differences explain more variation in delays than our variables of interest.

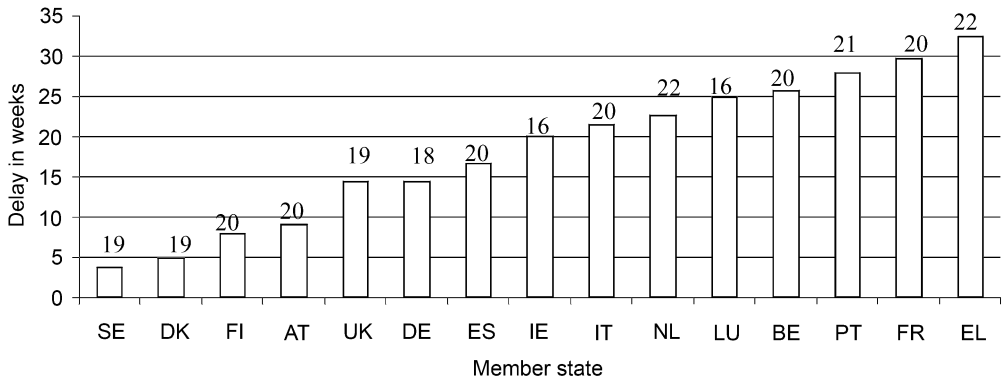


Fig. 4. Transposition delays by member states on twenty-four selected directives

Note: Mean average delay in weeks. Numbers above the bars indicate the numbers of the 24 directives that the member state reported transposing. See key to Figure 2 for names of member states.

Table 7 contains two Cox regression models of the delay in transposing directives.⁴⁵ Cox regression is an event-history modelling technique. It allows us to study the causes of a particular event (here, the coming into force of a member state's first national implementing measure in relation to a directive), over time (here, weeks after the deadline for national transposition specified in the directive). The technique also allows us to include censored cases in our analyses. These are cases for which no national implementing measures had been reported at the time of the data collection. The coefficients estimate the change in the probability of the event occurring at a particular time point due to a one-unit change in the independent variable of interest. The exponent of each coefficient is the proportional change in the hazard rate as a result of a one-unit increase in the value of the relevant independent variable. The two models presented in Table 7 differ from each other in the way in which differences amongst countries are examined.

Consider first the effects of states' incentives to deviate and discretion on delays. Surprisingly, member states' incentives to deviate have a positive effect on the chances of transposition at any given time point. The exponent of the coefficient in Model I of Table 7, 1.01, indicates that for every one-unit increase in a member state's incentive to deviate, the likelihood of transposition increases by 1 per cent at any point in time. Discretion has a significant negative impact on the chances of transposition at any given point in time. The exponent of the coefficient, 0.985, indicates that for every one-unit increase in the discretion granted to member states by a directive, the likelihood of transposition decreases by 1.5 per cent. There is no evidence of an interaction effect between incentives and discretion on the timing of transposition. The effects found are the same in both models, and therefore do not depend on the way in which differences amongst countries are controlled for.

⁴⁵ To test the robustness of the results, we re-analysed the data using a different dependent variable, whether or not member states reported national implementing measures. The results of a logistic regression are similar to those of the Cox regression for the delay of all directives.

TABLE 7 *Cox Regression Analyses of the Transposition of Directives Over Time (Weeks Since the Deadline)*

	Model I			Model II		
	<i>b</i>	s.e.	Exp (<i>b</i>)	<i>B</i>	s.e.	Exp (<i>b</i>)
<i>Independent variables</i>						
MS's incentive to deviate	0.010***	0.003	1.010	0.011***	0.003	1.011
Discretion ratio	− 0.015*	0.008	0.985	− 0.016*	0.008	0.985
MS's incentive × discretion	0.000	0.000	1.000	0.000	0.000	1.000
Commission's disagreement with directive	− 0.002	0.003	0.998	− 0.003	0.003	0.997
Policy fit†	1.104***	0.225	3.015	1.102***	0.233	3.012
<i>Worlds of compliance</i>						
(World of law observance = reference category)						
World of domestic politics ^a	− 0.151	0.171	0.859			
World of neglect ^b	− 0.238	0.177	0.787			
<i>Country dummies^d</i>						
Austria				− 0.150	0.341	0.860
Belgium				− 0.312	0.337	0.732
Denmark				− 0.115	0.332	0.891
Finland				− 0.040	0.326	0.960
France				− 0.233	0.332	0.792
Germany				− 0.292	0.352	0.747
Greece				0.048	0.333	1.049
Ireland				− 0.486	0.357	0.615
Italy				− 0.213	0.343	0.809
Luxembourg				− 0.699**	0.351	0.497
Netherlands				0.018	0.320	1.018
Portugal				− 0.157	0.336	0.855
Spain				− 0.101	0.330	0.904
United Kingdom				− 0.445	0.346	0.641
− 2 Log likelihood			2,767.112			2,758.497
<i>P</i>			0.00			0.00
<i>N</i>			333			333

Note: * $p \leq 0.10$; ** $p \leq 0.05$; *** $p \leq 0.001$. †Fit is measured by a dummy variable equal to 1 if the first national implementing measure came into force before the adoption of the directive; otherwise 0.

^aWorld of Domestic Politics is an indicator variable with value 1 for Austria, Belgium, Spain, Germany, the UK and the Netherlands, and 0 for other member states.

^bWorld of Neglect is an indicator variable with value 1 for Greece, Portugal, Luxembourg, France, Ireland and Italy, and 0 for other member states. The World of Law Observance, Denmark, Sweden and Finland, is taken as the reference group.

^dFor the country dummies, Sweden is the reference category.

The positive effect of states' incentives to deviate on the likelihood of transposition deserves some closer scrutiny. Table 8 presents another Cox regression, this time on those cases where states reported at least one national implementing measure. In that model, states' incentives no longer have a significant effect on delays. This shows that the positive coefficient associated with states' incentives is driven by the inclusion of cases where there

TABLE 8 *Cox Regression Analysis of the Delay in Transposition (Only Directives that were Transposed)*

	<i>b</i> (s.e.)	Exp (<i>b</i>)
Member state's incentive to deviate	0.002 (0.002)	1.002
Discretion ratio	− 0.018 (0.005)***	0.982
Fit	0.787 (0.219)***	2.197
− 2 Log likelihood	2,516.369	
<i>P</i>	0.00	
<i>N</i>	265	

Note: The discretion ratio has been multiplied by 100 to facilitate interpretation. *** $p = 0.001$.

are no reports of any national implementation measures. These are the censored cases with much longer delays, defined by the weeks between the deadline and the date of our data collection.⁴⁶ The cases in which states report no national implementing measures at all appear to be those on which they have low incentives to deviate.

The extent to which the Commission disagrees with the provisions of a directive does not affect the likelihood of transposition at any given point in time (Table 7). Policy fit is a dummy variable that indicates whether or not a member state's first national implementing measure came into force before the adoption of the directive. Therefore, by definition, such member states transposed the directive before the deadline and had a delay of zero. Policy fit has a strong and positive effect on the likelihood of transposition and is included in the models as a control variable.

Despite the apparent differences amongst countries regarding transposition delays, these differences are not significant. In Model I in Table 7, the effects of the 'worlds of compliance' are in the expected direction: the member states belonging to the 'world of domestic politics' transpose with more delay than do the member states belonging to the 'world of law observance'. For the member states belonging to the 'world of neglect' transposition delays are even longer. However, neither coefficient is significant. In Model II we control for variation at the level of the member states by including dummy variables for each country using Sweden as the reference category (the country with the shortest transposition delays, but not the country that transposed most directives). Only the coefficient relating to Luxembourg is significant, indicating that Luxembourg is less likely than Sweden to transpose a directive at any given time point. Clearly, country-level variation does not account for variation in the chances of member states transposing directives in any given week after the deadline.

⁴⁶ Similarly, there is a significant, negative correlation between member states' incentives to deviate and the delay in transposition when considering all directives, including those for which no national implementing measures are reported ($r = -0.29$, $p = 0.000$, $n = 333$). However, when directives for which no national implementing measures are reported are excluded, there is no evidence of a correlation ($r = -0.01$, $p = 0.92$, $n = 265$).

DISCUSSION

This article has examined the extent to which different explanations of compliance account for variation in infringements and delays. We have formulated hypotheses on the effects of member states' preference-based incentives to deviate from the content of EU directives. The hypotheses have also considered the amount of discretion granted to states in directives' provisions. These explanatory variables differ fundamentally from the state characteristics often emphasized in the existing literature, such as states' administrative efficiency. The evidence shows that states' incentives to deviate and discretion affect the likelihood of infringements and delays. In contrast, there is no evidence of significant differences amongst states in the cases we examine. Table 9 summarizes our findings.

With regard to infringements, states with high incentives to deviate are more likely to have infringement proceedings initiated against them. This is consistent with the first hypothesis, which posits that states are less likely to comply with directives they disagree with. Discretion does not appear to have a direct effect on the likelihood of infringements, as suggested by our second hypothesis. Nonetheless, in line with the third hypothesis, discretion is a key variable in gauging the impact of states' incentives to deviate. States with high incentives to deviate are less likely to have infringements if the directives grant them high levels of discretion. Discretion also affects transposition delays. Delays tend to be longer on directives that grant high levels of discretion. Neither states' incentives to deviate nor the interaction between incentives and discretion significantly affect delays.

Differences amongst member states could not explain variation in either infringements or delays. Each member state had one or two infringement proceedings launched against it. Furthermore, in the models of the timeliness of national implementation measures, almost none of the country variables were significant. This is an important finding since it has been suggested that differences amongst countries – for instance, regarding administrative capacity – influence the likelihood of compliance. Thus, our finding is in line with that of Börzel, who observed more variation across different policies within countries than amongst countries in the area of environmental law.⁴⁷ We also found little support for the 'worlds of compliance' explanation posited by Falkner *et al.* Member states in the 'world of domestic politics' or the 'world of neglect' are somewhat less likely

TABLE 9 *Summary of Effects on Infringements and Delays*

	Likelihood of infringement proceedings	Timely transposition
Member states' incentives to deviate	+	+(0†)
Discretion	0	–
High incentives to deviate × low discretion	+	0
Commission's disagreement with directive	+	0
Policy fit	+	+
Worlds of compliance	0	0
Differences amongst member states	0	0

†For the subset of directives that were transposed.

⁴⁷ Tanja A. Börzel, 'Why There Is No "Southern Problem": On Environmental Leaders and Laggards in the European Union', *Journal of European Public Policy*, 7 (2000), 141–62.

to report timely transposition than are member states in the 'world of law observance', but not significantly. There are several differences between our study and that of Falkner *et al.* that account for these differences. First, Falkner *et al.* examined six directives adopted in the mid-1990s, while we examine twenty-four directives adopted between 1999 and 2004. Secondly, Falkner *et al.* examine more direct measures of compliance, a point we shall return to below. Thirdly, we examine more detailed measures of member states' incentives to deviate. Fourthly, unlike Falkner *et al.*, we examine the relationships using multivariate methods that allow us to examine the effects of variables while controlling for others.

Our research suggests several priorities for future empirical research in this area. Infringements and delays are important indicators worthy of attention. Nonetheless, priority should be given to obtaining more direct measures of compliance with European directives and to combining these with detailed indicators of actors' incentives to deviate and discretion. In terms of measuring compliance at the national level, there is much to learn from Falkner *et al.*'s study. They consulted documentation and national policy experts to estimate the timing of compliance with six directives. As noted above, the timing of the national implementing measures reported by member states is open to criticism. They refer to the start of the transposition process, and give no guarantee that the directives to which they refer have been transposed correctly. Future research might also move beyond the transposition stage of compliance to observe changes in the practices of government agencies in response to EU directives. Moreover, member states' responses could be disaggregated to the level of the various provisions of the directives. This would provide more leverage by increasing the number of observations from the cases examined. Linking more direct and detailed measures of compliance with adequate indicators of actors' incentives to deviate and discretion is a challenge for future empirical research. By doing so, more refined tests of preference-based explanations could be conducted.

Our findings also have implications for future theory development. The first is that explanations of discretion should be linked with explanations of compliance. Franchino's research on discretion in the EU is a good example of theory-driven empirical research that aims to explain variation in the discretion granted to member states and the Commission.⁴⁸ However, the implications of discretion for compliance have yet to be fully elaborated. It appears that granting discretion to member states is an important mechanism used in the EU to achieve political progress in the face of disagreement. In other political systems, where there is a clear separation between decision-making actors and implementation agencies, higher policy conflict is associated with lower levels of discretion for implementation agencies.⁴⁹ By contrast, Franchino's research suggests that in EU decision making, higher levels of policy conflict are associated with higher levels of discretion.⁵⁰ The unique feature of EU decision making that may account for this difference is the blurred boundaries between decision makers in the Council, the member state representatives, and the implementers of EU directives, the member states' national governments and parliaments charged with transposing EU directives into national laws. When member states' preferred decision outcomes differ from the decision outcomes contained in the directives, they build in substantial discretionary powers for themselves.

⁴⁸ Franchino, 'Delegating Powers in the European Community'.

⁴⁹ Epstein and O'Halloran, *Delegating Powers*; Huber and Shipan, 'Deliberate Discretion?'

⁵⁰ Franchino, 'Delegating Powers in the European Community', p. 290. See also Bendor and Meirowitz, 'Spatial Models of Delegation'.

Future theory development on the impact of discretion should consider its different impacts on infringements and delays. Regarding infringements, discretion ensures that incentives to deviate are not translated into infringements. However, high levels of discretion are associated with a lower likelihood of timely transposition. It seems plausible that highly discretionary directives precede more complex and time-consuming national transposition processes. When national governments transpose and implement directives on which they have high levels of discretion, they must choose between a range of policy alternatives, which raises the possibility of controversy. In other words, when directives grant more discretion to member states, politics at the national level play a more prominent role. The findings also suggest that granting discretion may involve a trade-off between the quality and timing of compliance.

A second implication for theory development is that the behaviour of actors charged with monitoring compliance should be integrated into explanations of the compliance process. We found that the extent of the Commission's disagreement with the contents of a directive has a positive impact on the likelihood that it will initiate infringements against member states. Several possible explanations for this finding are worthy of future research. First, other actors might be more prone to monitor state compliance rigorously when the Commission disagrees with the contents of directives. They may report more cases of non-compliance to the Commission, on which the Commission is subsequently obliged to follow up. A second possible explanation is that to maintain its reputation as an impartial monitoring body, the Commission devotes more resources to monitoring compliance on directives with which it disagrees. A third possible explanation is that the Commission uses infringement proceedings to bend the implementation of directives it disagrees with towards its own preferred outcomes. In addition, member states' incentives to deviate may affect monitoring by other actors. Other actors, including the Commission, may more stringently monitor compliance in member states that are more opposed to a directive's contents.

A third area for future theory development and associated empirical research concerns the formation of member states' preferences on proposed directives. While it was hypothesized and found that preferences affect the likelihood of compliance, preferences have been treated as exogenous variables. Several practitioners whom we interviewed over the past years suggested that member states' positions are often defined by national provisions. Member states attempt to realize decision outcomes at the European level that require as little change as possible at the national level. There are also likely to be conditions under which member states do not support decision outcomes at the European level that are in line with their national provisions: for example, when the governing parties wish to use new European legislation to legitimize changes to their national legislation.

This line of theory development would connect the preference-based explanation of compliance with the policy-fit explanation.⁵¹ Given the rudimentary nature of our measure of policy fit, our finding that policy fit is associated with a higher likelihood of infringement proceedings is suggestive rather than conclusive. It emphasizes the importance of further theory development concerning the impact of existing policy measures on compliance. The presence of existing policy measures that relate to, but which are not entirely congruent

⁵¹ Francesco G. Duina, *Harmonizing Europe: Nation States within the Common Market* (Albany: State University of New York Press, 1999); Börzel, 'Non-compliance in the European Union'; Christoph Knill, *The Europeanisation of National Administrations: Patterns of Institutional Change and Persistence* (Cambridge: Cambridge University Press, 2001).

with, new European legislation implies the existence of entrenched policy routines that have to be changed. This may be more of a barrier to compliance than the complete absence of national provisions relating to the European legislation to be transposed. The effect of the fit between national and European legislation on compliance is likely to be mediated by decision making prior to the adoption of directives. In particular, when national provisions are incongruent with the proposed directive, discretionary provisions allow these national provisions to be maintained to a considerable extent.

